Re Go Ah Lek; ex p United Malayan Banking Corp Bhd

HIGH COURT (JOHOR BAHRU) — BANKRUPTCY NO 29–1260 OF 1996
ABDUL MALIK ISHAK J
20 NOVEMBER 1998

Bankruptcy *— Notice — Application to set aside — Notice did not follow prescribed form — Judgment not satisfied and execution not stayed — Whether court has basis to strike out notice — Bankruptcy Rules 1969, Form 7*

The judgment creditor obtained a judgment against the judgment debtor on 3 August 1992. Execution on the judgment had not been stayed and the judgment had not been satisfied. On 15 August 1996, a bankruptcy notice was issued against the judgment debtor. The judgment debtor failed to comply with the bankruptcy notice and the judgment creditor then took out the creditor's petition. The judgment debtor applied to set aside the bankruptcy notice by filing encl 18. It stated, inter alia, that the bankruptcy notice was bad in law and of no effect as it failed to comply with the provisions of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969. The judgment debtor also challenged the figures itemized in the judgment and contended that he did not owe any money to the judgment creditor.

Held, dismissing the application:

(1) Enclosure 18 failed to follow Form 7 of the Bankruptcy Rules 1969. It merely denied the quantum as set out in the judgment but failed to disclose that the judgment debtor had a counterclaim, set-off or cross-demand against the judgment creditor, a requirement under s 3(1)(i) of the Bankruptcy Act 1967 (see p 163F–G); *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 followed.

(2) In regard to the creditor's petition, there was no basis at all for the court acting in its bankruptcy jurisdiction to strike out the petition. The judgment was not satisfied and the execution thereof was also not stayed. The court was in no position to dispute the judgment (see p 165A–B); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 followed.

[Bahasa Malaysia summary

Pemiutang penghakiman telah mendapat suatu penghakiman terhadap penghutang penghakiman pada 3 Ogos 1992. Pelaksanaan ke atas penghakiman tersebut tidak digantung dan penghakiman tersebut belum lagi dipenuhi. Pada 15 Ogos 1996, suatu notis kebankrapan telah dikeluarkan terhadap penghutang penghakiman. Penghutang penghakiman telah gagal mematuhi notis kebankrapan tersebut dan pemiutang penghakiman telah kemudiannya mengeluarkan petisyen pemiutang. Penghutang penghakiman telah

memohon untuk mengetepikan notis kebankrapan tersebut dengan memfailkan lampiran 18. Ia menyatakan, antara lain, bahawa notis kebankrapan tersebut adalah tidak sah menurut undang-undang dan tidak mempunyai sebarang kesan memandangkan ia tidak mematuhi peruntukan-peruntukan Akta Kebankrapan 1967 dan Kaedah Kebankrapan 1969. Penghutang penghakiman tersebut juga telah mencabar jumlah yang disenaraikan di dalam penghakiman dan menegaskan bahawa beliau tidak berhutang sebarang wang dengan pemiutang penghakiman itu.

Diputuskan, menolak permohonan:

(1) Lampiran 18 telah gagal mematuhi Borang 7 Kaedah Kebankrapan 1969. Ia cuma telah menafikan jumlah yang telah dinyatakan di dalam penghakiman tersebut tetapi telah gagal untuk mendedahkan bahawa penghutang penghakiman tersebut mempunyai tuntutan balas, tolakan atau tuntutan bersilang terhadap pemiutang penghakiman, satu keperluan di bawah s 3(1)(i) Akta Kebankrapan 1967 (lihat ms 163F–G); *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 diikut.

(2) Berkenan dengan petisyen pemiutang itu, tidak ada asas langsung bagi mahkamah untuk bertindak di bawah bidang kuasa kebankrapannya untuk membatalkan petisyen tersebut. Penghakiman tersebut telah tidak dipenuhi dan pelaksanaannya juga telah tidak digantung. Mahkamah tidak boleh mempertikaikan penghakiman tersebut (lihat ms 165A–B*); Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 diikut.]

Notes

For cases on application to set aside a notice of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1708–1724.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (folld)

Fredericke and Whitworth, ex parte Hibbard, Re [1927] 1 Ch 253 (refd)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304 (folld)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)

Bankruptcy Rules 1969, Form 7

The judgment debtor in person.

Goh Mey Foon (*Leng & Co*) for the judgment creditor.

Abdul Malik Ishak J: On 3 August 1992, the judgment creditor (United Malayan Banking Corp Bhd) obtained a judgment in the Johor Bahru High Court vide Civil Suit No 22–259 of 1991 against Lundang Realty Sdn Bhd, Go Ah Lek (the present judgment debtor) and Lim Chew Huat in the following terms as seen in encl 21:

(i) Jumlah sebanyak RM120,918.42 bagi pinjaman overdraf yang dikira setakat 27 Julai 1992 dengan faedah seterusnya pada kadar:

(a) 11.5% setahun berdasarkan kadar bulanan dari 28 Julai 1992 pada RM80,000 yang pertama; dan

(b) 13.5% setahun berdasarkan kadar bulanan dari 28 Julai 1992 bagi baki yang masih terhutang di bawah kemudahan overdraft tersebut yang melebihi RM80,000,

hingga ke tarikh pembayaran penyelesaian;

(ii) jumlah sebanyak RM163,098.76 bagi pinjaman tetap yang dikira setakat 27 Julai 1992 dengan faedah seterusnya pada kadar 12% setahun berdasarkan kadar bulanan dari 28 Julai 1992 hingga ke tarikh pembayaran/penyelesaian dan faedah penalti sejumlah RM361.37 yang dikira setakat Julai 1992; dan

(iii) kos atas penetapan peguamcara-klien dibayar oleh defendan pertama, kedua dan ketiga kepada plaintif.

Execution on the said judgment had not been stayed and the judgment had not been satisfied. On 15 August 1996, Messrs Leng & Co, solicitors for the judgment creditor, requested the Johor Bahru High Court to issue bankruptcy notice against the judgment debtor for failure to satisfy the judgment dated 3 August 1992. On 15 August 1996, a bankruptcy notice was issued and addressed to the judgment debtor at No 7, Lorong 1, Jalan Songkit 12, Taman Sentosa, 80150 Johor Bahru, Johor. But the bankruptcy notice could not be served. That bankruptcy notice sets out the particulars of the debt in some detail totalling RM32,184.63. This figure would definitely have to be corrected when the final amount has been worked out. The time for service of the bankruptcy notice against the judgment debtor was enlarged and extended for a period of nine months from 15 November 1996 to 14 August 1997 by order of the senior assistant registrar ('the SAR') on 16 December 1996. The SAR also ordered that the bankruptcy notice be served on the judgment debtor by way of substituted service by posting a sealed copy thereof together with a sealed copy of the order of the SAR on the notice board of the High Court and by advertising the issuance of such bankruptcy notice in one insertion in the Sin Chew Jit Poh, a daily Chinese language newspaper circulating in West Malaysia. The SAR also ordered that the substituted service of the bankruptcy notice shall be deemed sufficient and valid service on the judgment debtor on the expiry of seven days after the last date of such posting or advertisement. Finally, the SAR ordered that the costs of the application be costs in the cause.

The judgment debtor failed to comply with the bankruptcy notice. The judgment creditor then took out the creditor's petition stating that the judgment debtor was justly and truly indebted in the aggregate of

RM30,684.63, being the amount due on the final judgment dated 3 August 1992, obtained by the judgment creditor. The creditor's petition also stated that the judgment debtor failed to comply with the bankruptcy notice issued on 15 August 1996 by the Johor Bahru High Court vide Bankruptcy No 29–1260 of 1996 which was served on the judgment debtor on 23 May 1997. The creditor's petition stated the act of bankruptcy was committed on 22 August 1997. The creditor's petition was dated 10 January 1998 and can be seen in encl 27.

The judgment debtor challenged the bankruptcy notice by filing encl 18. That enclosure was in fact an affidavit filed on 17 December 1996 by the judgment debtor which bore the caption 'Affidavit on an Application to Set Aside Bankruptcy Notice'. Enclosure 18 certainly makes for interesting reading. It stated, inter alia, that the bankruptcy notice issued on 15 August 1996 was bad in law and of no effect as it failed to comply with the provisions of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969. It then prayed for the setting aside of the bankruptcy notice. There was also a prayer that all further proceedings subsequent to the issue of the bankruptcy notice be stayed until final disposal of the judgment debtor's application to set aside the bankruptcy notice. The grounds of the application were also set out in encl 18 which referred to the judgment obtained by the judgment creditor on 3 August 1992 and the judgment debtor challenged the figures itemized in that judgment. It was the judgment debtor's stand that he did not owe any money to the judgment creditor as he had settled the full sum outstanding under the charge. It was said that the first bankruptcy notice was withdrawn on 4 October 1996 by the judgment creditor but this was followed by a fresh bankruptcy notice. It was deposed that the judgment creditor and their solicitors were responsible for the judgment debtor's loss in personal reputation computed at RM8.3m. The judgment debtor then prayed for the dismissal of the bankruptcy notice with costs.

Two things must be highlighted in regard to encl 18. Firstly, if it was meant to be an affidavit to set aside the bankruptcy notice, it failed to follow Form 7 of the Bankruptcy Rules 1969. Secondly, it merely denied the quantum as set out in the judgment dated 3 August 1992, but failed to disclose that the judgment debtor has a counterclaim, set-off or cross-demand against the judgment creditor, a requirement under s 3(1)(i) of the Bankruptcy Act 1967. If authority is required for these simple propositions, reference should be made to the case of *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298, where at p 303 of the report Mohamed Dzaiddin SCJ had this to say:

> We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand, etc against the respondent, which he is required to depose under s 3(1)(i) of the Bankruptcy Act ('the Act') and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act, and the

case should have been treated as if no affidavit under r 95 had in fact been filed.

At para 7.2 of encl 18, the judgment debtor merely deposed as follows:

> The judgment creditor obtained judgment against Lundang Realty Sdn Bhd and other(s) in Johor Bahru High Court Civil Suit No 22–259 of 1991 for RM120,918.42 on the overdraft account and RM163,098.76 on the fixed loans account of Lundang Realty Sdn Bhd. The two sums in the said judgment are incorrect being calculated not according to the letter of offer of the defendant dated 3 October 1990. I enclosed letter of offer dated 3 October 1990 marked 'GAL–1'.
>
> Particulars
>
> A Overdraft was offered as follows:
>
> (i) RM35,000 at interest of BLR + 4%pa
>
> (ii) RM80,000 at interest of BLR + 2%pa
>
> (iii) Excess of overdraft at interest of BLR + 4%pa
>
> B Fixed loans were offered at interest of BLR + 2%pa

and in a bankruptcy proceeding, this court certainly cannot go behind the judgment dated 3 August 1992. The then Supreme Court in the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 in strong language castigated the trial court for going behind the judgment. This was what the Supreme Court said through Lee Hun Hoe CJ (Borneo) at p 305 of the report:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *Re Easton* (1893) 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under s 3(1)(i) of the Bankruptcy Act 1967, a debtor commits act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment.

Before me, in chambers, the judgment debtor took exception to the fact that a fresh bankruptcy notice was issued. The short answer can be found in the case of *Re Fredericke and Whitworth, ex p Hibbard* [1927] 1 Ch 253. That case briefly stated that where a petitioning creditor has issued and served upon a debtor a bankruptcy notice which has not been complied with, he is not thereby precluded from issuing and serving a second bankruptcy notice upon the debtor in respect of the same debt; and the debtor is not entitled to excuse himself from compliance with the second notice on the ground that there is an existing available act of bankruptcy under the first notice.

The judgment debtor too raised up another trivial point. It was pointed out that the bankruptcy notice was not registered nor signed by the bankruptcy clerk. A perusal of that bankruptcy notice particularly at p 6 indicates that only the SAR signed that notice and the seal of the High Court appears therein. Indeed, there is no legal requirement under the

Bankruptcy Act 1967 or even under the Bankruptcy Rules 1969 for the bankruptcy clerk to sign the bankruptcy notice.

In regard to the creditor's petition, there was no basis at all for this court acting in its bankruptcy jurisdiction to strike out the creditor's petition. It must be borne in mind, for fear of repetition, that the judgment dated 3 August 1992 was not satisfied and execution thereof was also not stayed. I am in no position to dispute the judgment dated 3 August 1992. At this juncture, it is germane to reproduce passages from the judgment of Lee Hun Hoe CJ (Borneo) in the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* at pp 305–306 of the report:

> Further, we do not think it is open to the learned judge in the exercise of his jurisdiction in bankruptcy proceedings to strike out the creditors' petition by disputing the validity of the orders made in earlier execution proceedings when the orders had not been set aside. This is particularly so when there has been no application by the respondent to set aside the execution orders. The two orders were made on 25 January 1980 and 20 June 1980. By an order dated 25 January 1980, the shares in the respondent's name were taken in execution and issued in the sheriff's name. Unless and until this order has been set aside, it is binding and effective. The respondent has not at any time taken any step to have it set aside.

As Lord Diplock, delivering the judgment of the Privy Council, in *Isaacs v Robertson* [1984] 3 All ER 140 explained in the following passage at p 143:

> 'Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside ... .'

After pointing out that in neither of the two Privy Council cases of *Marsh v Marsh* [1945] AC 271 and *MacFoy v United Africa Co Ltd* [1962] AC 152 nor in any other case could it be found that any order of a court of unlimited jurisdiction had been held to fall in a category of court orders that could be ignored because they were void ipso facto without there being any need for proceedings to have them set aside, he went on to stress:

> '... The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it on application to that court; if it is regular, it can only be set aside by an appellate court on appeal if there is one to which an appeal lies.'

An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp* [1904] 1 KB 572. As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau* (1889) 22 QBD 83; *Re Howell* (1915) 84 LJKB 1399.

It is not clear whether the respondent was also making a cross demand or challenging the amount actually owing as counsel for the respondent contended that all orders made previously were null and void. If the respondent was making a cross-demand, he must quantify it. He just could

not come to court and said his shares were worth considerably more. The burden of proof is on the respondent to show by the affidavit or affidavits three things which were stated clearly by Warner J in *Re a debtor (No 75N of 1982, Warrington), ex p The Debtor v National Westminster Bank* [1983] 3 All ER 545 at p 553 as follows:

> '... First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is genuine. To satisfy that requirement, the cross-demand must be put forward in good faith and must have a reasonable probability of success, or, as it has also been expressed, must give rise to a triable issue. In the latter respect, there is no hard and fast rule as to the degree of proof required. It depends in each case on the particular facts and circumstances of that case. Second, the affidavit or affidavits must show that the cross-demand could not have been set up in the action in which the judgment relied on by the creditor was obtained. Third, the affidavit or affidavits must show that the cross-demand need not be for a liquidated sum or even for a sum of money at all. But it must be capable of being quantified in terms of money and the affidavit or affidavits must quantify it.'

Proviso (ii) to sub-s (2) of s 3 reads:

> 'A bankruptcy notice under this act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice —
>
> (i) ...
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.'

Under proviso (ii), a notice demanding a greater amount would not be liable to be held bad and incapable of amendment.

Williams and Muir Hunter on *The Law and Practice of Bankruptcy* (19th Ed) at p 492 under the heading 'Formal Defect Not To Invalidate Proceedings', refers to s 147(i) of the English Bankruptcy Act 1914 which is word for word the same as our s 131:

> '147(i) No proceeding in bankruptcy shall be invalidated by any formal defect or by irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.'

Where a bankruptcy notice has been served, and not complied with, in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively per se cause the notice to become defective or irregular, so as to require the protection of this section.

The respondent gave notice of intention to oppose the petition but made no mention of any irregularity. It is fair to say that if one wants to challenge

A the validity of a bankruptcy notice, one must give proper notice. We are unable, as the respondent urged us, to say that the bankruptcy notice is irregular and invalid and that the respondent has not committed an act of bankruptcy within the meaning of s 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein.

For reasons given, we allowed the appeal.

B

These rather long passages serve as a solemn reminder that it would not be an easy task to challenge the bankruptcy notice and the creditor's petition. The judgment debtor must now realize that he was going on an uphill task in his attempts to appeal against the decisions of the SAR's as exemplified in encl 38 (where the judgment debtor's application to oppose the creditor's C petition was dismissed by the SAR with costs) and encl 40 (where the SAR dismissed the judgment debtor's application to set aside the bankruptcy notice). Incidentally, encls 38 and 40 were appeals by the judgment debtor to the judge in chambers and the submissions were conducted personally by the judgment debtor while Mdm Goh Mey Foon acted on behalf of the judgment creditor.

D

The judgment debtor was most unhappy with the figures that appeared in the bankruptcy notice in encl 3 and he submitted that these figures did not tally with the judgment creditor's banking accounts as exhibited in exhibit marked 'GAL–5' in the affidavit entitled 'Affidavit Against Creditor's Petition' filed by the judgment debtor on 8 July 1998 as seen in E encl 30. As the going got tough, the judgment debtor had the audacity to label the learned counsel for the judgment creditor as a 'liar'. Such derogatory remark was uncalled for and must surely be made in the heat of passion in the course of an oral submission. It must be emphasized that the banking accounts of the judgment showed figures which were higher than those creditor claimed by the judgment creditor in the bankruptcy notice. F The figures in the bankruptcy notice were computed on the basis of the judgment dated 3 August 1992 and, consequently, these were the correct figures. Even Lee Hun Hoe CJ (Borneo) in *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* had occasion to remark in the context of the particulars of debt in the bankruptcy notice that the quantum 'will have to be corrected G when the final amount is worked out' (see p 304 right hand column between 'G' to 'H'). At any rate, as I said the challenge to the bankruptcy notice was mounted in breach of Form 7 of the Bankruptcy Rules 1969 read with s 3(1)(i) of the Bankruptcy Act 1967.

For these varied reasons, I dismissed encls 38 and 40 with costs.

H *Application dismissed.*

Reported by Jafisah Jaafar

I